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IN THE

Supreme Court of the United States

October Term, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.P.A.,

Petitioner,

v.

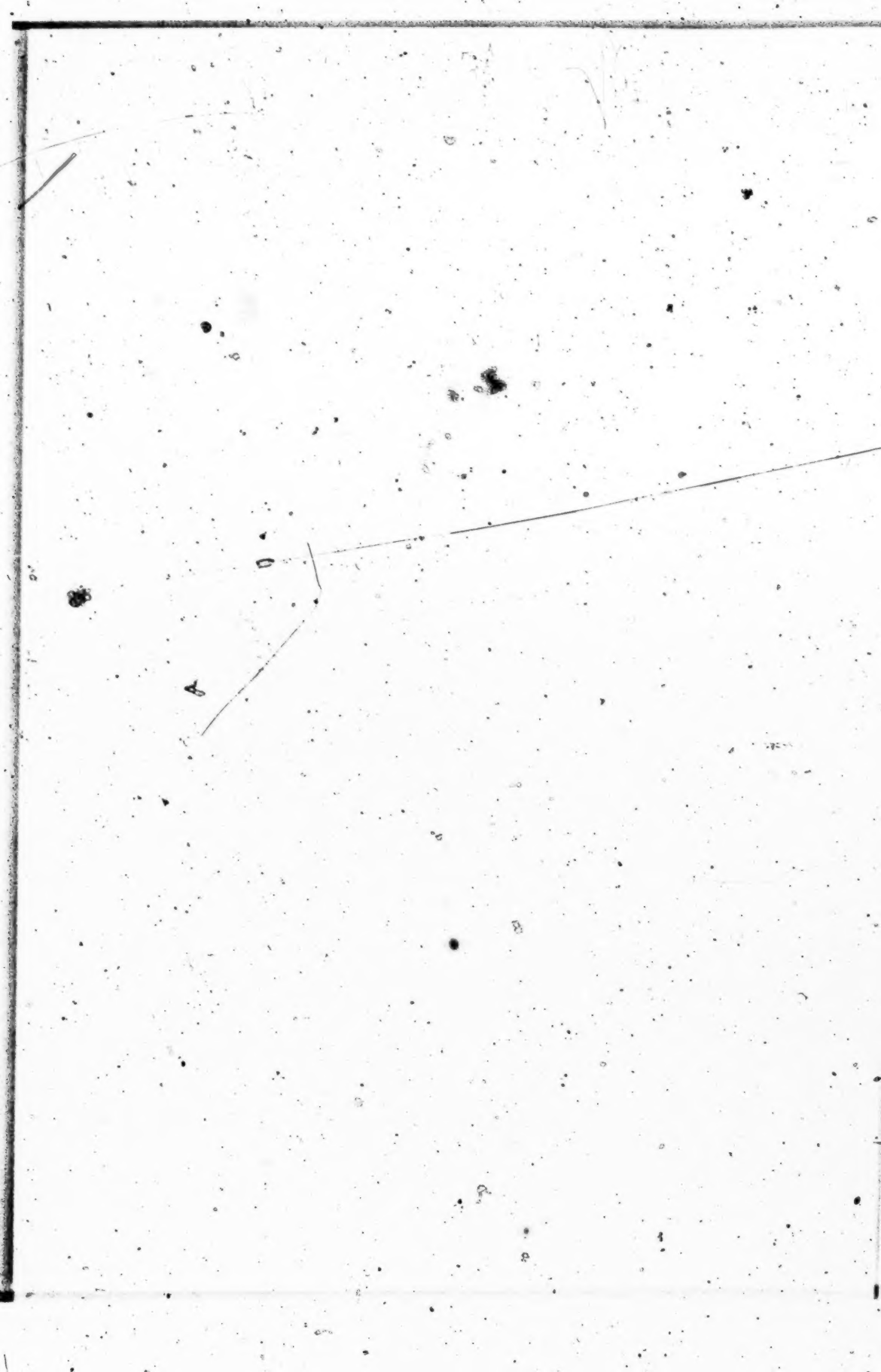
JOHN LISI, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

THEODORE E. WOLCOTT
Counsel for Respondents
36 West 44th Street
New York, New York 10036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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS*

Questions Presented

1. Whether the petitioner Alitalia delivered to its passengers before departure of the aircraft involved, a ticket contract which complied with the prerequisites of the Warsaw Convention and which gave clear and readable notice to the passenger that the transportation was subject to the provisions of the Warsaw Convention which limit its liability?

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* Emphasis, wherever the same appears is our own unless otherwise noted.

2. Was the decision of the Court of Appeals affirming the District Court, correct in holding as a matter of law, that there was no delivery here of a ticket complying with the Warsaw Convention in that the so-called ticket was unnoticeable and unreadable and consisted of a mass of "microscopic print", the conditions "camouflaged in Lilliputian print", "the exculpatory statement on which defendant relies . . . virtually invisible . . . inffectively positioned . . . artfully camouflaged . . . (and) concealed . . ." and that the passenger, therefore had no reasonable opportunity to protect himself against the limitations of liability?

3. (Assuming but not conceding readability and that this question be reached) — Did the so-called ticket comply with the requirements of the Convention that it contain an unconditional as well as readable notice that the transportation involved is subject to limitations of liability?

4. (Assuming but not conceding readability and intelligibility, and that this further question be reached) — That as to the DiSclafani family (*Como* action) originating on Alitalia in Tunis where their tickets were issued, should the notice and conditions of carriage on the ticket have been in Arabic, the official language of Tunisia, in order to impute notice of these conditions to passengers?[1]

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[1] The so-called "Questions Presented" by Alitalia numbered 2 and 3 are not here involved, are improper and should be disregarded. As to so-called Question No. 2: Any attempt by Alitalia on this appeal to erect an issue as to the adequacy of the baggage checks is improper. The plaintiffs did not put into issue the adequacy of the baggage check since the values of the baggage lost in these cases were below the Convention limits. There is a vast difference in the basic approach of our courts to the question of limitation of liability for wrongful death or personal injuries and in their approach to the limitations of liability for loss of bag-

Statement of the Case

These are five actions for wrongful deaths and serious personal injuries variously suffered by respondents and their decedents (collectively referred to herein as "plaintiffs") arising out of an airplane crash on February 26, 1960 on take-off from Shannon Airport, Ireland, where it had stopped for fuel, in the course of a transatlantic flight from Rome to New York on an aircraft owned and operated by petitioner (hereinafter referred to as "Alitalia"). In its answers to the complaints herein, Alitalia uniformly set up affirmative defenses that "the transportation was being performed pursuant to a contract made with each of plaintiffs decedents"; that "the rights of the parties herein are governed by said contracts of transportation," and that Alitalia has duly complied with the conditions of the Warsaw Convention (¶52, A. 4a), and has not entered into a special contract for a higher limit of liability" (¶59, A. 6a) that the liability if any, was limited to $8,291.87.

These actions involve the deaths of seven passengers and serious personal injuries of six other passengers— thirteen passengers in all. The enormous consequences of this crash may be well illustrated by a brief reference to the calamity suffered as a result of the negligence of Alitalia in one of

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gage or personal property. See *Seth* v. *British Overseas Airways Corp.*, 329 F. 2d 302 which involved a claim for baggage only. However no question was there raised as to the readability of the notice to the extent that this question may be found to be pertinent here. Respondents' position is that the baggage check nevertheless suffers from the same defects as the ticket although this is not before the court. As to so-called Question No. 3: The notice conditions printed on the passenger ticket were held by the courts below to be unreadable as a matter of law. The question was also conceded by both sides to be a matter of law. At no time in its papers, briefs or argument to the courts below did Alitalia claim that this was a jury question.

the cases herein, *Como as guardian ad litem of the DiSclafani children and as Administratrix of the DiSclafani decedents,* Civil Number 63-1734 (A. 107a). The *DiSclafani* family were on their way to New York on Alitalia from Tunis. The family consisted of a widowed mother, Caterina and her four children, Nicholas aged 17; Alfredo aged 15; Maria aged 12 and Guiseppe aged 10. The widow and Alfredo died of fatal injuries suffered in the crash. The other children suffered serious and permanent injuries requiring medical and hospital treatment in Ireland and later in the United States and some of them are still undergoing medical treatment. The crash totally disabled Nicholas. His injuries included permanent paralysis of the lower extremities. He is now a paraplegic and permanently confined to a wheelchair. Maria suffered fractures of the pelvis and other parts of the body among other injuries. Guiseppe also suffered multiple fractures among other injuries. It would be unnecessary to dwell upon the excruciating pain, shock and emotional disturbance suffered by these children.[2]

It is conceded for the purposes of the proceedings herein that the transportation was international and was otherwise subject to the relevant provisions of the Warsaw Convention. It is not conceded that the tickets and baggage checks in any way comply with the Warsaw Convention, nor that Alitalia has sustained the required pre-conditions of establishing that it complied with the convention. The rights of the *DiSclafani* claimants in the *Como* action are reserved on the question whether Tunisia was a party to the Warsaw Convention at the time the so-called tickets herein were issued in Tunisia to the *DiSclafanis.*[3]

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[2] From answers to interrogatories filed by plaintiffs in the U.S. District Court.

[3] For the purposes of the original motion before the District Court this issue was there withdrawn by the plaintiffs. See footnote 7 of Opinion by Judge MacMahon. (A83a).

Plaintiffs Motion for Partial Summary Judgment and the Decision of the District Court

Plaintiffs moved in the District Court for partial summary judgment striking the defenses on the ground that there was no delivery of a ticket to the passengers containing readable and intelligible notice of limitation of liability as required by Warsaw and under American law and that therefore the small damage limit of liability could not be applied. Alitalia claimed that the ticket need contain no notice, nor any other particulars and, in effect, could be blank. It should be noted that the adequacy of the ticket solely as such was put into issue in the District Court by the plaintiffs' moving papers (A. 13a, 15a, 17a, 26a, 29a) as further certified by plaintiffs' attorney (A. 65a, 70a) and also as certified by Alitalia's attorney (A. 66a).

District Judge MacMahon held that the tickets herein failed to notify "the passengers that the exclusion or limitation provisions of the Convention were applicable." He held that the ticket compelled this conclusion for the reason that the statements in the so-called ticket were printed in the manner as to be virtually unnoticeable and unreadable employing such descriptive terms as "Microscopic type . . . camouflaged in Lilliputian print . . . . concealed . . . in a thicket . . . which must be read through a magnifying glass."

> "The footnotes printed in microscopic type at the bottom of the outside front cover and coupons, as well as condition 2 (a) camouflaged in Lilliputian print in a thicket of 'Conditions of Contract' crowded on page 4, are both unnoticeable and unreadable. Indeed, the exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, con-

trasting color, or anything else. Lilliputian typography, which must be read through 'a magnifying glass', is at war with the intent of the Convention" citing cases (A. 82a).

". . . Manifestly, if the ticket and check delivered by the airline fail to notify the passenger that the exclusion or limitation provisions of the Convention are applicable, the passenger is not afforded a reasonable opportunity to protect himself by deciding not to take the flight, entering into a special contract with the carrier, or taking out additional insurance" (A. 75a).

Judge MacMahon in footnote 7 of his Opinion rejected plaintiffs' additional point that even if readable the references in the ticket to the applicability Warsaw when framed in conditional terms was therefore objectionable (A. 82a). A reproduction of the ticket was included in Judge MacMahon's Opinion (A. 78a).

The Decision of the Court of Appeals

The Court of Appeals below affirmed the District Court, two-to-one (A. 89a) 370 F. 2d 508. The majority fully agreed with the District Court that Alitalia as a matter of law had failed to deliver to the passenger a readable and intelligible ticket complying with the Warsaw Convention.

The court incidentally noted that the Convention's arbitrary limitations on liability, "which have been severely and repeatedly criticized" are advantageous to the carrier but that "the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (A. 96a). The Court noted in this connection that "Article 3 must be viewed in light of the other articles and the overall purposes of the convention"; and that its decision was generally consistent with the policy of the United States Government and the Civil Aeronautics Board.

The court below agreed that the District Judge "appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print . . . . in a thicket'" and that the so-called 'exculpatory statements' . . . are 'virtually invisible'. The court also observed in a footnote number 10 of its Opinion that even if a passenger were able to read the fine print "it is highly questionable whether he would be able to understand the meaning of the language" (A. 98a).

THE DISSENTING OPINION: In his dissenting Opinion, Judge Moore perforce assumed a series of extreme

postures. While agreeing that the ticket provisions were "in exceedingly small type", Judge Moore expressed the extreme view that adequacy of notice on the ticket was immaterial; that even if a "one-sided advantage is being taken of the passenger" he was not protected by Warsaw, and, in any event, he apparently should not be protected by our courts. Judge Moore attempted to reinforce his argument by erecting a straw man of an "actual notice" ruling by the majority which, in fact, had not been urged by the plaintiffs nor held by either of the courts below. It should be observed that, except for a slight increase made by the Hague Protocol (not accepted by the United States) no "substantial revisions upward . . . have been made by treaty", as claimed by Judge Moore. There have been no revisions. However, there were some subsequent tariff changes relating only to transportation touching upon U. S. territory, made by means of the air carriers filing conditional and cancellable tariffs. These tariffs were apparently filed to induce the United States to withdraw its denunciation of Warsaw (see footnote 7, majority opinion below, A. 96a).

Nor did either of the courts below attempt to revise the limits as suggested by Judge Moore. They were concerned only with and ruled only upon the adequacy of notice to the passenger of the limitations of liability as expressed on the ticket. In no way did they rewrite the convention but they merely construed sections pertinent to the point at issue.

Judge Moore took the extreme and unsupported position that the convention so clearly stated that no notice need be contained in the ticket (and that any kind of ticket could be delivered to the passenger), that there was no room for construction; that construction meant interference and "judicial treaty-making." Judge Moore chose to

ignore the well established rule that a treaty, like any other federal statute, is subject to judicial construction and interpretation.

Both the District Court and the Court of Appeals interpreted Warsaw within its framework and cited and applied established principles of law. They properly held that the so-called ticket did not comply with the requirements of the Warsaw Convention and in so doing they did not rewrite, modify or repudiate the Convention.

Summary of Argument

The Court of Appeals has followed the well established principles of construction of treaties and has given the Warsaw Convention a reasonable construction within its overall purpose, context and history that is incidentally fair to both the passenger and the air carrier. The decision is consistent with the overall pattern and intent of Warsaw that a contract must be made between passenger and carrier which contains required particulars essential to its understanding; that the air carrier must deliver to the passenger such a ticket-contract containing clear and readable notice of the exculpatory provisions before it can claim the convention's one-sided benefits. The decision is a reflection of well established public policy and is in accord with the policy of the United States Government and of the Civil Aeronautics Board's own position requiring clear and adequate notice. (See Memorandum for the United States as *amicus curiae*.)

The decision of the Court below is in accord with all Court decisions construing Article 3 of the Convention, *Mertens* v. *Flying Tiger Line, Inc.*, 341 F. 2d 851 (C.A. 2); *Warren* v. *Flying Tiger Line, Inc.* (1965 C.A. 9), 352 Fed. 2d 494, and with the most recent decision squarely on the

point by the New York Court of Appeals, *Egan* v. *Kollsman Instrument Corp. & American Airlines*, January, 1968, —— N. Y. 2d ——, and with the reasoning in the *Eck* v. *United Arab Airlines* Cases 360 F. 804 and 15 N. Y. 2d 53. It also follows the basic principles of American law requiring reasonable notice to a passenger where limits of liability are sought to be imposed, notwithstanding the negligence of the carrier. The structure and purpose of the Warsaw Convention is in accord with the foregoing and is in direct contradiction to the position of Alitalia that there need be no contract, that only a blank boarding pass need be handed to the passenger and that the limitations of liability of the Warsaw Convention will be automatically imposed because this is otherwise Warsaw transportation. Alitalia has been unable to cite a single case in direct support of its position.

The structure of the Convention is skeletal and does not attempt to cover all details. It was designed in such a manner as to allow for the operation of local national law on the issues here involved. As was observed of the decision below in the United States Government's *Amicus* brief: "It also represents, in our view a proper performance of the judicial duty of the courts of contracting states to implement the broad provisions of the Convention" (p. 7).

The position of Alitalia has been reduced to a *reductio ad absurdem*. While admitting that "use . . . and delivery of a passenger ticket is a 'must and compulsory'," (Alitalia brief, pp. 9 and 10) it nevertheless argues that none of the particulars prescribed in Article 3 of Warsaw need be on the ticket. In effect, Alitalia urges all that is required to shield the carrier from the consequences of its negligence is to hand the passenger a blank, "Boarding Pass". Obviously delivery of such a "ticket" would be a meaningless

exercise in futility. Similarly Alitalia has without foundation claimed that the circuit court's holding would result in the application of "sanctions" of absolute liability. While not conceding that this would be a dire consequence, plaintiffs contend that this issue is not in this appeal, having neither been raised nor passed upon below and that a finding of absolute liability would not necessarily follow. In any event Alitalia, having for many years at the passenger's expense reaped the benefits of its defective ticket, is in no position to complain. Plaintiffs anticipate no difficulty in proving ordinary negligence on the part of Alitalia in causing the crash, if that should prove necessary.

In an attempt to overcome the plain intent of Article 3 and the context of the convention, Alitalia has resorted to carefully selected excerpts from the Minutes of the Warsaw Conference of 1929. As the Conference Minutes confirm, the Convention is a one-sided arrangement, entirely favoring the commercial carrier at the expense of the passenger and in diminution of his basic legal rights to recover fair compensation for injuries suffered through fault. Although the carrier's liability remained based on fault, in an illusory exchange for a rebuttable presumption of limited liability [Article 20(1)], the carrier was given a low ceiling of up to $8300 of provable damages for death or injury to a passenger notwithstanding the carrier's negligence. However the grant of this unconscionable advantage to the carrier and the virtual extinction of the passengers' rights was conditional upon the delivery to the passenger of a ticket giving him clear notice of the limitation of the carrier's liability.

The misplaced emphasis by Alitalia on certain language differences in the Articles relating to the ticket and to the baggage checks and airway bills are not in keeping with the overall text of the Convention, its purpose nor

with its history. In fact the Minutes establish that there was a common element of notice to the passenger as well as to the shipper; that the form of the passenger ticket was made more flexible because of the possibilities of clerical error in omitting a particular which might prove immaterial. Whereas in case of the baggage check and airway bill, certain particulars were mandatory because they cover unaccompanied goods and the information was necessary to ascertain ownership and to compute damage in case of loss.

Notwithstanding the main issue of the delivery of an adequate ticket it is, nevertheless, also contended by plaintiffs that a statement that the transportation is subject to the rules relating to limitation of liability under the Warsaw Convention must be clearly unconditional as required by the Convention.

It is further contended [assuming this point to be reached] as to the DiSclafani family, which embarked from Tunis where the ticket was issued, that in order to charge them with imputed knowledge, the conditions of carriage would have to be in the official language of the country [Tunisia] where the ticket was issued, which is Arabic in this instance.

The *Amici* briefs filed herein on behalf of Alitalia's position must be regarded as designed to advance special commercial interests and not that of the public. They are filed by trade associations of commercial air carriers, the Air Transport Association of America (ATA) and the International Air Transport Association (IATA) and by countries which directly or indirectly own and control commercial air carriers, viz: Italy—which owns Alitalia, United Kingdom—which owns British Overseas Airways Corporation and British European Airways; Canada—which owns Air Canada, formerly Trans-Canada.

I.

Alitalia Failed to Deliver to the Plaintiffs' Decedents a Ticket Containing Readable and Clear Notice of the Limitation of Liability as Required in the Convention, and Its Exculpatory Provisions Therefore Cannot be Invoked by Alitalia to Escape the Consequences of Its Negligence in Causing the Crash.

A. *Warsaw Requires Prior Delivery of a Ticket Containing Clear and Adequate Notice.*

The weight of authority is that prior readable and clear notice in the ticket of limitations of liability is required by the Warsaw Convention. This is also in keeping with well established principle. The decision of the Court below is in accord with all of the reported decisions on this point. *Egan* v. *Kollsman Instrument Corp., and American Air Lines,* —— N. Y. 2d —— (decided January, 1968); *Mertens* v. *Flying Tiger Line, Inc.,* 341 F. 2d 851 (C.A. 2), cert. den. 382 U. S. 816; *Warren* v. *Flying Tiger Line, Inc.,* 352 Fed. 2d 494 (1965 C.A. 9); the *Eck* v. *United Arab Airlines, Inc. Cases* reported in 360 F. 2d 804 (C.A. 2); and 15 N. Y. 2d 53. In so construing the intent of Article 3 and the purpose of the convention, the court below also observed the basic principles of law requiring readable notice thereof in a ticket where limited liability is sought to be imposed notwithstanding the negligence of the carrier. In the course of its analysis of the convention, the court stated:

> "Thus, the language of Article 3 cannot be considered in isolation; rather, it must be viewed in light of the other Articles and the overall purposes of the Convention. See *Eck* v. *United Arab Airlines, supra*" (A. 94a).

The court then quoted from its prior decision in *Eck* in which similar issues were present and in which it had held that the ticket and notice were inadequate:

> "'We read Article 3 (2) to require that the ticket be delivered to the passenger in such a manner as to afford him a reasonable opportunity to take measures to protect himself against the limitation of liability. Such self-protective measures, could consist of for example, deciding not to take the flight, entering in a special contract with the carrier, or taking out additional insurance for the flight. *The Convention specifically provides that 'the carrier and the passenger may agree to a higher limit of liability' (Article 22 (1)) and there would be little reason* to make this provision, to require that the ticket state that the liability of the carrier is limited. (Article 3 (1) (e)), and to require that such a ticket be delivered to the passenger *unless the Convention also required that the ticket be delivered in such circumstances as to afford the passenger a reasonable opportunity to take these self-protective measures.' Id.* at 856-57 [Emphasis added.]" (A. 94a).

The court below concluded that the notice on the *Lisi* ticket was illegible and unreadable:

> "Judge MacMahon appropriately characterized the 'notice' to the passengers in his pithy conclusion as 'camouflaged in Lilliputian print in a thicket of 'Conditions of Contract'. . . . Indeed the exculpatory statements on which defendant relies are virtually invisible. They are in effectively positioned, diminutively sized, and unemphasized by bold-face type, contrasting color, or anything else. The simple truth is that their presence is concealed'" (A. 98a).

The Court then affirmed:

> "We agree that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice. The District Court properly granted partial summary judgment striking out these affirmative defenses of appellant. Affirmed (A. 100a).

The latest decision on the precise point at issue here is the recent unanimous holding of the New York Court of Appeals that a similar international ticket was insufficient and unreadable and that the air carrier therefore could not invoke the limitations of the Warsaw Convention. See *Egan* v. *Kollsman Instrument Corp. & American Airlines,* —— N. Y. 2d ——, January, 1968, in which *Lisi* was explicitly followed.* We quote from the opinion of Chief Judge Fuld for a unanimous court:

> "Mrs. Eileen M. Seiter was killed when the American Airlines plane on which she was a passenger crashed as it approached La Guardia Airport on February 3, 1959. Her administrators have brought this action for wrongful death and American has raised as an affirmative defense the limitation of liability provisions of the Warsaw Convention. . . ."

> "Under Article 3 (1) (e) of the Convention, an airline is required to deliver a passenger ticket which contains a 'statement that the transportation is subject to the rules relating to liability established by this convention.' The ticket before us did contain, in footnotes on the several coupons, such a statement (*supra,* pp. 1-2) but, as is apparent from inspection, *it is in such exceedingly small and fine print as almost to defy reading.* [*The court in a footnote 5 quoted with evi-*

* Notwithstanding the court's notation that certiorari had been granted herein.

dent approval Judge MacMahon's observations upon the unreadability of the ticket.] Thus, although there was literal compliance with the prescription of Article 3, the question arises whether such compliance satisfies the Convention's demands when viewed in the light of its overall purposes. We do not believe that it does. *In our judgment, a statement which cannot reasonably be deciphered fails of its purpose and function of affording notice and may not be accepted as the sort of statement contemplated or required by the Convention.*" . . .

The New York Court of Appeals observed that the ticket before it was virtually identical with the *Lisi* ticket and held it insufficient. Commenting upon the decision of the Court of Appeals [C.A. 2] in *Lisi*, it said:

". . . And, even more recently, the United States Court of Appeals for the Second Circuit, confronted with the precise problem now before us, decided that a ticket, containing a statement (as to the carrier's liability) *virtually identical in content and form with that in this case,* failed to give passengers the notice required by the Convention. (See *Lisi* v. *Alitalia-Linee Aeree Italiane,* 370 F. 2d 508, cert. granted 36 USLW 3189.) After observing out (sic) that 'the Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier,' the court, in an opinion by Judge Kaufman, went on to say that 'the *quid pro quo* for the one-sided advantage is delivery to the passenger of a ticket . . . which give [s] him notice' of a 'very substantially' limited liability and affords him 'the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit' (pp. 512-513). Pointing out that the state-

ment on the tickets under consideration was printed in such a manner as to be virtually unnoticeable and unreadable, the court concluded, as already noted, that the tickets did not give the passengers the required notice."

The New York Court of Appeals also noted with approval the *Mertens* and *Warren* decisions:

"Other interpretations of Article 3 have also taken into account the fact that a traveler today is likely to undertake international travel quite casually and without realizing the drastically limited protection they are receiving when compared to that provided by domestic flights. (See *Mertens* v. *Flying Tiger Lines, Inc.*, 341 F. 2d 851 [2d Cir.]; *Warren* v. *Flying Tiger Lines, Inc.*, 352 F. 2d 494 [9th Cir.]"

The New York Court of Appeals then remarked upon the 1963 C.A.B. regulation requiring the conditions to be printed in large contrasting type:

". . . In addition, the Civil Aeronautics Board in 1963 adopted a regulation requiring (1) that the statement as to limitation of liability follow the far more clear and specific language specified by the Board; (2) that it 'be printed in type at least as large as ten point modern type [as contrasted with the 4½ poin' pe in this case] and in ink contrasting with the ock'; and (3) that a similar statement be placed at all ticket counters in letters at least one-fourth of an inch high (14 Code Fed. Regs., §221.175)" . . .

The New York Court of Appeals affirmed that the ticket is in conflict with our national policy:

". . . These decisions and regulations are suggestive of a national policy requiring that air carriers give pas-

sengers clear and conspicuous notice before they will be permitted to limit their liability for injuries caused by their negligence. An examination of the ticket forms which the respondent used, in the light of that policy, can only lead one to conclude that Mrs. Seiter was not sufficiently apprised of the consequences. . . ."

The Court, in striking the defense of Warsaw limitations of liability, concluded:

". . . Despite the fact that the Convention was applicable to her journey, the carrier's failure to give the requisite notice prevents it from asserting a limitation of liability. Accordingly, the plaintiff's motion to dismiss the third affirmative defense should have been granted." . . .

In *Warren* v. *The Flying Tiger Line, Inc., supra,* the Court of Appeals criticized the inadequacy of the ticket in that the conditions printed thereon "would be difficult for one to read the fine print on the back of these tickets without a magnifying glass." The court in *Warren* held that Article 3 should not be read alone, saying:

"But the provision in question does not stand alone. It is part of an Article of the Convention in which the particulars to be contained in the passenger ticket are spelled out in detail. *One of these particulars, contained in Article 3 (1) (e) is the inclusion of a statement '. . . that the transportation is subject to the rules relating to liability established by this convention.' The purpose of such a statement is to notify passengers of the applicability of the Convention,* thus affording them an opportunity to take steps to protect against the limitation of liability. The most common self-protective measure is, of course, the pro-

curement of additional flight insurance. See *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (C.A. 2)". (p. 497)

It is noteworthy that the Court in *Eck*, 15 N.Y. 2d 53, also stressed the necessity of having pertinent particulars stated in the ticket so that the passenger would have notice thereof:

". . . It cannot be implied, as such a change would take from the passengers, without notice, the very relief which the treaty gave them and intended that they continue to have . . ." (p. 61)

Axelrod v. *Incres Steamship Co.*, 363 F. 2d 531, C.A. 2, is apropos here. In that case the Court found the steamship ticket, which consisted of a mass of fine print, ambiguous, and the notice of the time limitation therein, insufficient. The Court held:

"Nothing in the remainder of the ticket dispels our initial confusion. At the end of the two-page finely written ticket appears the printed term 'The Carrier' —a term employed freely in the preceding *sixteen eye-defying paragraphs,* but never defined therein." (p. 533).

In *Lachs* v. *Fidelity & Casualty Co. of N.Y.*, 306 N.Y. 357, 364 (1954), the defendant unsuccessfully claimed the airline trip insurance contract did not apply to non-scheduled carriage. The Court observed that . . . "the average man . . . is (not) expected to carry the Civil Aeronautics Act or the Code of Federal Regulations when taking a 'plane".

B. *The Burden of Proof of Compliance is Upon Alitalia.*

The principle is well established that a party seeking to impose an unusual condition, such as a limitation of liability for negligence which is basically repugnant to our American system of jurisprudence, has the burden of showing that the transaction comes within the exception to the prevailing rule of law of unlimited liability for negligence. See *Santa Fe Ry.* v. *Grant Bros.*, 228 U. S. 177, 184 (1931); *Oceanic Steam Navigation Co.* v. *Corcoran*, 9 F. 2d 724 (C.A. 2, 1925); *The Majestic*, 166 U. S. 375, 385; *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N. Y. 244; *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34; *Rawson* v. *Pennsy. R.R. Co.*, 48 N. Y. 212; *Klar* v. *H.&M. Parcel Room, Inc.*, 270 A. D. 538, aff'd 296 N. Y. 1044. Compare insurance contracts, which are construed against the insurance company; *Lachs* v. *Fidelity & Casualty Co. of N. Y.*, 306 N. Y. 357; *Hartol Products Corp.* v. *Prudential Insurance Co.*, 290 N. Y. 44, 49.

The policy of the United States[4] was well expressed by this court in *Adams Express* v. *Cronyer*, 226 U. S. 491:

> "That a common carrier cannot exempt himself from liability for his own negligence or that of the servants is elementary" (p. 509). ". . . a contract of exemption from liability is against public policy and void" (p. 511).

Accordingly having claimed and pleaded the Warsaw limitation, the burden of proof is upon *Alitalia* that it has complied with all conditions precedent and that it has delivered a readable ticket to the passenger which clearly gives him notice of the limitation of liability. (See also *Notarian* v. *Trans World Airlines*, (1966 W. D. Pa., 9 Avi. 17,871).)

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[4] Cf. Federal Legislation such as Federal Employers Liability Act, Federal Tort Claims Act, Death in the High Seas Act.

The Warsaw Convention merely codified the basic rule of liability for fault. However it provided that if there was the prior delivery of a ticket-contract with the passenger containing the required particulars essential to its purpose as a contract including the vital noticeable and readable provision that the liability of the carrier was limited, then the carrier could invoke the limitation benefits of Article 22 (1). But in such event the passenger would then be in a position to take "self protective measures" such as "deciding not to take the flight, or entering into a special contract with the carrier (Article 22 (11)) or taking out additional insurance for the flight" (A. 95a).

In *The Majestic, supra,* p. 20, the United States Supreme Court held that the conditions or limitations are not part of the contract, and at best, merely constitute notices and, if not brought to the passenger's attention, were not binding upon the passenger unless specifically spelled out. See also *Oceanic* (*supra,* p. 20), which noted that the "common carrier and his customer do not stand on a footing of equality." 7 N. Y. Jur., CARRIERS, sec. 942 *et seq.*; 14 Am. Jur. 2d sec. 942 *et seq.*; 13 C. J. S. sec. 629 *et seq.*

C. *The Warsaw Convention Should be Liberally Construed in Favor of the Passenger.*

The above is particularly apt in view of it being a private law treaty serving the special commercial interests of the carriers. This Court has said: "It is the general principle of construction with respect to treaties that they shall be liberally construed." *deGeofrey* v. *Riggs,* 133 U. S. 258, 271; see also *Factor* v. *Laubenheimer,* 290 U. S. 276, 293. In *Neilson* v. *Johnson,* 279 U. S. 47, 52, which involved a construction of bilateral inheritance tax treaty, the Supreme Court held:

"The narrow and restricted interpretation of the treaty contended for by respondent . . . is not consonant with

the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties" (p. 51). "When a treaty provision fairly admits, of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred" (p. 52). "Where the meaning is uncertain, recourse may be had to . . . the parties own practical construction of it" (p. 52).

The fact that Alitalia has utilized tickets which have the surface appearance of compliance with the particulars required by Article 3 indicates a practical construction and basic acceptance by Alitalia of the fact that notice is required by the Convention.[5] Although as the court below has found, Alitalia did its best to conceal the notice from the passenger. Article 3 was in reality more honored in the breach and by lip service rather than by practical and effective notice in the ticket to the passengers.

Furthermore in similar situations the courts have chosen to interpret the Warsaw Convention in light of modern conditions in accordance with the general rule in International Law of *Rebus Sic Stantibus*, (Amer. Law. Inst. Restatement 2d. Ed. Foreign Relations Law, Sec. 153).

In interpreting the language of the Convention, the court, in *Eck* v. *United Arab Airlines*, 360 F. 2d 804, said:

"Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have

[5] A practice long followed by IATA, see note 8, *infra*, p. 53.

changed in the area to which the words of the provision refer" (p. 812).

It should be noted that the New York Court of Appeals stressed the necessity of interpreting the Warsaw treaty in relation to our time. In *Eck* v. *United Arab Airlines,* 15 N. Y. 2d 53 the Warsaw Convention was interpreted in terms of contemporary conditions. The Court held:

"After reading all of the provisions of the Warsaw Convention and applying the purposes disclosed therein to the conditions under which the carriers operate in this Jet Age, . . ." (p. 57).

In reversing, the Court of Appeals observed that the Appellate Division had overlooked:

". . . the canon that, when a treaty is invoked, what is to be applied are its principles if its purposes are to be observed presently as in the past. . . . In doing this it must be recognized that the literal wording of one particularly applicable section of the entire treaty should not set the limits of our interpretive examination. (*Choctaw Nation* v. *United States,* 318 U. S. 423, 432 [1943.]) The proper procedure now is to examine the treaty as a whole, along with its history, and, in particular, to look into the problems which it was intended to solve" (p. 59).

II.

The Warsaw Limitation of Liability is Conditional and is Neither Automatic nor Self-Executing. Warsaw Merely Codifies Basic Law of Liability for Fault, Providing However That After a Prescribed Contract of Carriage Ticket Containing Essential Particulars Describing the Journey Including Adequate Notice of the Limitation of Liability has Been Made and Delivered to the Passenger, Then and Only After it has Fulfilled Such Pre-Conditions, may the Carrier Invoke a Limitation of its Liability.

A. *The Applicability of the Convention's Limitation Presupposes Prior Delivery of an Adequate Ticket-Contract As Provided by Articles 1, 3, 22(1) and 28.*

Alitalia in essence is seeking to subvert the basic purpose of the Convention. As stated by the Court below quoting from its prior opinion in the *Mertens* case:

> "The Convention's arbitrary limitations on liability—which have been severely and repeatedly criticized—are advantageous to the carrier. But the *quid pro quo* for this one-sided advantage is delivery to the passenger of a ticket and baggage check which give him notice that on the air trip he is about to take, the amount of recovery to him or his family in the event of a crash, is limited very substantially. Thus the passenger is given the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit" (A. 96a).

Article 3 must be read with the other Articles of the Convention. A comprehensive reading establishes that limitation of liability is based upon the contract principle.

It is not automatic. It comes into play only after the prescribed contract is made with the passenger establishing, among other things, the international nature of the journey and giving readable and unequivocal notice that it is subject to the limitations of liability set out in the Convention. The ticket-contract must meet the requirements of Articles 1, 3, 22 (1) and 28.

In the "Scope-Definitions" of Article 1, it is provided that:

> "(2) . . . 'international transportation' shall mean any transportation in which, *according to the contract made by the parties*, the place of departure and the place of destination . . . are situated either within the territories of two High Contracting Parties, . . ."
>
> "(3) Transportation . . . by several successive air carriers shall be deemed, . . . to be one undivided transportation, if it has been *regarded by the parties* as a single operation . . ."

Obviously, the reference to "contract" necessarily refers to the ticket since only from this document can the passenger see what places, territories are involved in order to determine whether it is Warsaw transportation. The "contract" (or meaningful ticket) concept is repeated in Article 3 "Transportation Documents, Passenger Ticket" and in the venue provisions of Article 28 (to determine where action may be brought) and in the successive carriers provisions of Article 30, all of which presupposes the existence of a readable ticket intelligible to the passengers.

Also necessary to this scheme, are the provisions of Article 22 (1) where it is stated "Nevertheless by special contract, the carrier and the passenger may agree to a higher limit of liability." This provision would be meaningless if

the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by the Court of Appeals below.

The structure of Warsaw is skeletal. "The Warsaw Convention is by no means perfect. Either deliberately or by omission, a number of questions were left open which, according to the background drafting documents, would presumably be resolved by national law." (Sand: Air Carrier Limitation of Liability, 28 J. Air L. 260,267 n. 67; article cited in Opinion below. Articles 21, 22 (1) 24 (2), 25 (1), 28 (2) and 29 (2) explicitly refer to applications of national law. As hereinafter discussed the design of Article 3 in relation to the whole illustrates the foregoing perfectly in situations where the materiality is in issue of a particular omitted from the ticket, or made unreadable.

B. *The Difference in Drafting Between Article 3 and Articles 4 and 8 is Consistent With a Requirement in the Ticket of Notice of Limitation of Liability.*

(1) *As to Article 3* (*Passengers*): Article 3 provides that, "the carrier *must* deliver a passenger ticket which *shall* contain the following particulars": [The particulars required include the details of the contract and the notice essentials of Articles 1 and 22 (1)].

(a) "The place and date of issue"

(b) "The place of departure and of destination"

(c) "The agreed stopping places" (Note: As a means of helping to determine the international and Warsaw character of the transportation, as (b) above).

(d) "The name and address of the carrier or carriers" (Note: The application of Article 28 would require

the ticket to contain items (a), (b) and (d) in order to determine where the action may be brought).

(e) "A statement that the transportation is subject to the rules relating to liability established by this Convention." (The Court is respectfully referred to Point I hereof).

Subdivision (2) of Article 3 provides:

"(2) The absence, irregularity or loss of the passenger ticket shall not effect the existence or validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability."

This language eliminated the possibility of the carrier being deprived of its limitation defense by some slight clerical error or other minor irregularity, or by the inadvertent omission of an item non-essential to the particular transportation, or by the ticket being lost or not presented ("*absence*") at embarking. Flexibility was achieved in relating a fault in the ticket to its materiality in a given situation. See discussion of its history at Point III hereof, *infra*. But nevertheless a meaningful ticket be delivered to the passenger. It was thus left to the national courts when the situation arose, as it did in *Egan, Mertens, Warren* and in the instant case, to state what constituted delivery of an adequate ticket under the circumstances.

The necessity of clear notice in the ticket is implicit in the provisions of Article 22 (1) where it is stated "Nevertheless by special contract, the carrier and the passenger

may agree to a higher limit of liability." This provision would be meaningless if the passenger had no prior notice on the ticket that the carrier's liability "was subject to the rules relating to liability established by this convention." This aspect was stressed by both Courts below. See also *Egan, Mertens* and *Warren, supra.*

(2) *As to Articles 4 and 8 (baggage and goods):*

In the transportation of unaccompanied baggage or goods, on the other hand, certain specific particulars are necessarily explicitly stated to be minimal. In the case of baggage (Article 4), these particulars are a means of identifying the baggage owner by requiring the number of the passenger ticket to be written on the baggage check, and to determine the dollar amount of liability, by requiring the number and weight of the packages to be listed. The accompanying mandatory statement that the transportation is subject to the limitations of liability established by the Convention is particularly necessary so that it may be read with Article 22 (2) which describes the method of computing the dollar amount of damages in the case of loss of baggage or goods. Article 8 (the airway bill) is for similar reasons detailed as to the nature of the goods, the international character of the transportation, the identification of shipper the consignee and the first carrier, the weight and the quantity of the packages and the notice of limitation in order to determine the dollar amount of damages under 22(2), the person entitled thereto and the carrier liable.

C. *Alitalia's Assumed Posture of Resultant "Absolute Liability" Which is not an Issue Here.*

As a part of its "dire consequences" approach, Alitalia for the purposes of this appeal, claims "absolute liability

herein would follow from the decision below. This is not in issue nor was it raised in the original motion papers nor in the opposing affidavits, nor passed upon by the lower courts herein. With this reservation, plaintiffs respectfully submit that "absolute liability" does not necessarily follow and its application is far from clear. Having for many years at the exense of the passengers reaped the benefits of Warsaw limitations by means of a ticket that the courts have found more deceptive than informative, Alitalia is in no position to complain. However if it should prove necessary plaintiffs anticipate little difficulty in establishing that Alitalia was guilty of ordinary negligence or fault which caused the deaths and serious injuries suffered herein.

III.

The History of Article 3 Establishes that it was Designed to be Part of the General Pattern of the Traffic Documents' Notice Requirements Except That it Granted a Greater Flexibility to the Carrier if There was an Inadvertent Omission of a Non-Essential Particular Which Omission Would Not Otherwise Adversely Affect or Injure the Passenger.

A. *The Warsaw Conference of 1929 Retained the Basic Rule of "Liability Based On Fault"; its So-Called Shift of "The Burden of Proof" Made No Change of Substance.*

To begin with, it should be stated that none of the Courts reviewing Article 3 on this issue experienced any difficulty in holding that its evident import was that the ticket must contain a clear and readable notice to the passenger that the transportation was subject to the limitations of liability under the Convention. This was expressed in the decision of both Courts below and by the New York Court of Appeals in the recent *Egan* case and the courts in the *Mertens* and *Warren* cases.

In an effort to bolster its posture that only a blank boarding pass need be issued and that the limitations of liability are self-executing and automatically impinge upon the unknowing passenger, Alitalia claims that the drafting history of Article 3 points to a result contrary to the aforementioned decisions.

Plaintiffs respectfully submit that in actual fact the drafting history clearly points to a uniform purpose of required notice to the passenger or shipper. Alitalia's assertions to the contrary notwithstanding, the Warsaw Convention was conceived by European Government-owned and controlled air carriers with a view to primarily benefiting the carrier and not the passenger. It should be stated at the outset that the United States did not participate in the conference and only had an observer present, (Lowenfeld and Mendelsohn: *The United States & the Warsaw Convention*, 80 Harv. 497, 502).

The "one-sided" purpose of the conference delegates to favor the air carriers is evident from a reading of the Minutes of the Warsaw Conference in 1929.[5] As Rapporteur De Vos put it in his report to the Delegates:

> "These rules stemmed from the theory of fault in the liability of the carrier toward the passengers . . . (But) . . . The Conference had admitted that the carrier could be freed of all liability when he had taken all reasonable and normal measures to avoid the damage." (Warsaw Minutes, 7838, p. 15).

It is of particular interest that Rapporteur De Vos admitted that "the terms of the Convention are, practically,

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[5] Warsaw Minutes, ICAO Doc. 7838. The original Minutes of the Conference are in French. Quotations therefrom hereinafter made are in our own translations.

particularly favorable to the carrier." (Warsaw Minutes, p. 165)." . . . "The air carriers expect of us that we give them and the underwriters the juridical base of their exploitation." (id. pp. 16 and 17). ". . . the limitation of liability being fixed from the point of view of the carrier, . . ." (id. p. 159): The Italian delegate made an observation to the same effect: *Mr. Ambrosini (Italy)*: "The carrier is already benefiting from a special liability, according to the rules we have established and which represent a very large decrease of the liability vis a vis common law." (id. p. 68).

The Conference recognized the then current basic civil and common law, as imposing a strong presumption of liability against the carrier to the practical extent of assuring recovery by the passenger except for *force majeure* and contributory negligence.[6] (De Vos. id. p. 15-17). The so-called exchange of shift in the burden of proof from the passenger to the carrier for a ceiling of recoverable damages in the nominal sum of $8300 was in fact illusory. As far as the American passenger was concerned he already enjoyed under common law the doctrine of *res ipsa loquitur*. Nor could his right to fair compensation for injury from fault be taken away by a so-called contract

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[6] (Cohen: Negligence Law in Europe, 361 Ins. L.J. 82, Feb. 1953). See also George W. Orr: *Fault as the basis of Liability*, 21 J. Air L. & C. 399, 402 in which it is stated:

"Most nations using the Code System have imposed presumptive liability upon the common (including the air) carrier. . . . I would say from my wide international experience, rather than from actual research, that *the majority of nations impose presumptive liability*, although the definition of due care varies widely.

A good example of this degree of liability is included in the so-called Warsaw Convention of 1929 which has been accepted by most major nations of the world. The burden of proof is on the carrier to prove due care. *Being so near the code requirements of most adherents*, many nations have adopted the Warsaw standard of liability for their domestic and non-Warsaw standard to effect uniformity."

with the carrier. See *Conklin* v. *Canadian Colonial Airways*, 266 N. Y. 244; *The Majestic*, 166 U. S. 375 and cases cited at p. 20 hereof.

Another highly important right taken from the passenger was the universally recognized transitory nature of his right to bring action against the carrier wherever he could find him. Under Article 28, he became limited to a few selected places convenient to the carrier.

B. *The Requirements of Notice in the Ticket were Retained.*

It should be noted that in his preliminary report to the Conference, Rapporteur De Vos outlined the essentials of the proposed convention:

> "The essential thing, with regard to this, is the sanction, sanction provided for the three documents and which consists in withdrawing from the carrier who would transport passengers or goods without documents, or with documents not in conformity with the convention, the benefit of the advantages provided by the convention . . ." (Warsaw Minutes, p. 15).
>
> "A special document is provided for the transportation of passengers. This document is necessarily different from those used for the transportation of baggage and goods. *This passenger ticket shall only contain a minimum of particulars. On the other hand, the sanction for transportation of passengers without ticket or with a ticket not in conformity with the Convention, shall be identical with that provided for transportation of baggage and of goods.*" (pp. 160 and 161).

These observations with respect to the ticket were similar to the proposal of the Hellenic delegate for flexibility in the

ticket, accepted in principle by all the delegates when they adopted the final draft of Article 3.

The procedure adopted by the conference in reviewing the preliminary draft was for the various delegates to note written objections, amendments or proposals as to each item contained in this draft (id. p. 177). The work of the Conference was begun by the appointment of a preparatory commission to review suggestions under the chairmanship of Mr. Giannini, (Italy). Except for a basic question referring to the "economy" of the treaty all proposals and questions were regarded as procedural (Warsaw Minutes, pp. 22, 23 and 24). It is of particular note that in the Summary of Proposals or amendments made by the delegates to the various articles of the preliminary draft there were no amendments or proposals to eliminate the particulars required for the ticket under Article 3 except for the suggestion by the Greek Delegate of flexibility to allow for clerical error. There were no proposals from any of the delegates to eliminate the sanctions against the carrier as provided in the preliminary draft of Article 3. (id. p. 179, Summary of Proposals).

The Hellenic proposal with respect to Article 3 is set out in the Warsaw Minutes at page 196. It should be noted that the Helenic proposal did not eliminate sanctions but merely made the ticket more flexible if a particular was omitted by a clerical error and that particular was immaterial to the interests of the passenger. We quote from the Hellenic proposal beginning at page 196 of the Minutes:

> "It may happen, in fact, that due to a simple neglect, the carrier has omitted to mention in the passenger ticket the place of issue, or the point of departure or his name and address; or even that he keeps on the ticket his old address, or, finally that he does not point out

an intermediate stopping-place. These are, general, omissions of no great importance for the most part. . . ." (pp. 196-197).

The Hellenic proposal went on to say:

"If the omission is of no interest to the other party and causes no damage, how can this severe sanction of the carrier be justified? This sanction is only justified in case the omission of a particular would have caused a damage to the passenger, as it may happen under certain circumstances. But who shall judge if there is damage, because of this omission, to the other contracting party" (p. 197).

It is significant that the Hellenic proposal stated that it would be up to the Court to judge whether the omission from the ticket of an otherwise required particular caused damage to the passenger. In other words, it was the function of the court (as in this case) to determine the sufficiency of the ticket:

"Certainly it shall only be the court before which the case is brought which shall be able to give an appreciation" (p. 197).

It may also be noted in passing that the Japanese made comment on Articles 3 and 4 to the effect that inclusion of the clause concerning limitation of liability should remain compulsory (id. p. 201).

In reporting upon the few suggested amendments with respect to Article 3, and in commenting upon a proposal that a list of passenger names be required, Rapporteur De Vos stated that they would be included in the ticket particulars:

"These proposals (the passenger list) have been rejected, which does not mean that they (the names) will not, or would not appear on the passengers' document of transportation: in fact, these particulars are there" (id. pp. 100 and 101).

It is remarkable that the Rapporteur's summary of the Hellenic delegate's suggestion specifically noted that the required particulars would be retained, but that the air carrier would be relieved of the onus if the omission was insignificant:

"But in the face of an observation by the Hellenic Delegate, which reads as follows: The last paragraph of the article decrees the sanctions in case of absence of the passenger ticket, or when the passenger ticket does not carry all the particulars indicated, *from then on the sanction is too harsh, when there is a simple omission, a negligence of an employee of the company of transport—the commission has agreed with this viewpoint,* and in the last paragraph, it eliminated the words: 'or if the document does not contain the above particulars'.

But the consequences of this was that one had to be much stricter for those particulars imposed on the passenger ticket" (id. pp. 100 and 101).

The intention to retain the particulars in the passenger ticket was again illustrated by Rapporteur De Vos when he commented that the item "name and address of the carrier or carriers" should be retained in the plural rather than the singular, when he said:

"In reality, if we accepted this change, action in liability in favor of the passengers would become impossible. Therefore the Commission has retained the present text" (id. 100).

In the discussion on the baggage check, following the discussion on the ticket, the mandatory presence of the particulars on the ticket was assumed when it was stated by De Vos: ". . . the baggage ticket bears the number of the passenger ticket, and the passenger ticket contains the indications concerned" (id. p. 104). De Vos equated the notice requirements in both documents:

> "The Commission felt that it was preferable to put under letter h) the following article *which imposes the obligation to put on the passenger ticket a clause stipulating that the transportation is subject to the terms of liability established by the present convention.* As for the obligatory mentions, the commission decided to reduce to a bare minimum these obligatory letters d), f), h). This refers to the 3rd paragraph relating to the sanction for omission of particulars on the document. The last paragraph has not been changed as in *Article 3, i.e., we have maintained the same sanction of errors* in the particulars, but it only concerns, as obligatory mentions, letters d), f), h)" (id. pp. 104 and 105).

That the purpose of sanctions as to the ticket was retained was indicated in the description of its similarities to the airway bill by the Rapporteur:

> "For Article 8, the same observations were presented as for *Articles 3 and 4* concerning the particulars which *must appear* on the document of transportation." ". . . The reason which exists in *Article 3* to maintain the words "or the carriers" does not exist here, due to the fact that the recourse for goods is different from the recourse for passengers" (id. pp. 105 and 106).

The discussion, in the last session on October 10th, immediately prior to the adoption of the final draft of

Article 3 throws further light in the general understanding of its import. It was stated by Mr. Youpis (Hellenic Republic) that sanctions would continue to be uniform as to all traffic documents.

> *Mr. Youpis—(Greece)*—"In the first paragraph of this Article (3), it says: 'a statement that the transportation is subject to the rules relating to liability established by this convention.' This particular also figures in Article 8, concerning the waybill; but in Article 4, paragraph 2, letter h) the formula says: 'under the terms of this convention.' *I believe we should adopt a uniform formula.*"
>
> *Mr. Giannini—(Italy)—President of the Commission*: —"As I have warned you, as we go along and examine each Article, we shall eliminate the small errors which may have slipped in. We tried to use a uniform language, but if something escaped us, please call it to our attention. *Of course the formula must be the same all over.*"
>
> *The President*—"Nobody wants the floor? I put Article 3 to a vote" (adopted). (id. pp. 129-130).

It was observed by the Swiss delegate during the discussion of the particulars that should be embodied in the passenger ticket that all necessary information should be there in clear and self-evident form:

> "... *we must enlighten the public, it should not have to go to the companies of air navigation* to ask them: how do you do it? *The public is not going to go to the company of air navigation to say: give me your general conditions, so that I can see if I am protected. It does not cost anything to add a line if it will avoid a misunderstanding* ..." (id. 103).

As the Italian delegate put it in discussing the necessity for flexibility with respect to the ticket "I think it better to give some indications and allow practice to develop." . . . "We have before us a new mode of transportation." (Warsaw Minutes pp. 103 and 104). Mr. Giannini, President of the Commission, had expressed the same thought: "The Convention was designed to be as flexible as possible" (id. p. 23).

The foregoing analysis of the history of Article 3 is supported by Goedhuis' own report of the proposal of the Hellenic delegate which is made at page 152 of his book:

> "With regard to this article, the delegate of the Greek Government at the Warsaw Convention pointed out that the sanction provided in the case under (2) would be much too rigorous *if the carrier had omitted to put down the place of issue or the place of destination, or his name and address, just through carelessness.* How could this severe sanction against the carrier be justified *if the omission was of no interest to the other party and of no injury to him?*"

C. *The Hague Protocol is Immaterial Herein.*

The defendant has attempted to make capital out of the fact that Hague Protocol amending the convention (not adhered to by the United States) makes a drafting change in Article 3, specifically excluding the limitations of liability for failure to state essential items in the ticket.

A reading of the minutes of the Hague Meeting will show that the change in the Hague Protocol as to Article 3 was due to the realization that the technique as originally suggested by the Hellenic delegate of leaving to a local court the issue of whether an omission was material may

have created differences of application and approach in various national courts. There was almost unanimous agreement of the Hague delegates that requirement of notice to the passenger should accordingly be made more explicit. It was thus decided to adopt the American suggestion to specifically provide for greater uniformity of drafting among all the traffic documents. What was predicted by the American delegates (remarks of Mr. Calkins at page 116 of Minutes of 1955 Hague Conference, ICAO Document #7686-LC/140) and others as to the requirements of the American Courts with respect to notice came to pass in *Lisi, Egan, Mertens* and *Warren* as soon as the specific point had been properly put into issue before the Court.

In any event, the Hague Article 3 differs from the present Article 3 in many material respects to the degree that a true comparison is beside the point. The changes made were in keeping with the real purposes of the Hague Conference which was not to benefit the passenger but to plug up holes, real or fancied, in the current Convention and make it more airtight against the passengers, throwing them a sop of an additional $8000 which was meaningless in terms of the values otherwise involved. The wilful misconduct clause (article 25) was amended to insure that the limitation of liability was impregnable, short of proving intent to murder. The Hague Article (3) specifically provided that the ticket constituted "*prima facie* evidence of the conclusion and existence of the contract of carriage". This in effect shifted the burden of proof of delivery of an appropriate ticket from the air carrier to the passenger and still left the carrier with all its defenses including limitation of liability. Small wonder that the United States refused to adhere to it.

IV.

The Decision Below is in Accord With the Position of the Civil Aeronautics Board and the United States Public Policy.

Alitalia claims that the passenger tickets herein were approved as to form and content by the C.A.B. citing *Pan-American World Airways, Inc.*, 24 CAB 575 (1957), which claim has been rejected by the United States Government *Amicus* brief. In that proceeding, the C.A.B. limited itself to approving, as to participating American carriers, the IATA interline resolutions and agreements. However it specifically criticized the ticket in its Order E-11024 appended to its decision, expressly observing also at p. 577 that approval of the resolution did not constitute approval of the legal effect of the ticket. The Board did not purport to "pass on the size of the type . . . or other typographic details the airlines should employ in printing the required warning regarding limited liability . . . Indeed the print on the ticket here is far smaller than that used in the report. . . ." (U.S. brief p. 8). See also Opinion below commenting upon C.A.B. policy at footnote 10, (A. 99a).

In its Order No. E-1944, Docket 14411, adopted on April 1, 1963, referring to agreement C.A.B. No. 10559, R-2, relating to the form of passenger ticket and baggage check, the C.A.B. said:

> "Insofar as applicable to the notice provisions now appearing in the ticket, the Board stated (1) *the type in which the ticket notice is currently printed on the ticket is too small to alert passengers to the importance of the matter*, and (2) *that the monetary limit of liability for death or injury does not appear in the notice.*

Therefore, in conjunction with the proposed amendment of Part 221, the *Board will re-examine its approval of the IATA Agreement* relating to the form of tickets and baggage checks (Agreement No. CAB 10559 (R-2)."

This order refers to previous Order E-11024, which had been previously adopted on February 21, 1957, contained in 24 CAB 575, *supra*. In the above referred to Docket 14411, dated April 1, 1963, the C.A.B. also proposed to add a new paragraph (j) to Title 14, C.F.R. §221:38 which now provides for a notice of limitation of liability for injury or death under the Warsaw Convention, specifically stating:

"Notwithstanding the provisions of the paragraph (h) of this section; each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liability to passengers as provided in Article 22 (1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention including the amount of the liability limit in dollars. Where applicable, a statement advising passengers of the amount of any higher limit of liability assumed by the carrier shall be added."

It is clear from the foregoing that the C.A.B., had not approved this ticket as such, but had found the same faults with it as have our courts in *Lisi, Egan, Mertens* and *Warren*. See also 14 C.F.R. 221.175 in which the CAB specified that at least 10 point modern type in contrasting ink be employed.

The ATA and IATA Joint *Amici* brief at p. 15, n. 21 attaches thereto as Appendix E, the so-called "Passenger Ticket—Conditions of Contract", which it asserts was submitted to the C.A.B. in connection with 24 CAB 575, *supra*. Appendix E which is obviously not the ticket, is nevertheless self-defeating here. It is respectfully submitted that this Appendix E further exposes the speciousness of the air carrier argument. This "Conditions of Contract" Exhibit as submitted to the C.A.B., consumes six legal-size pages of incomprehensible equivocating legalisms. All this was further compounded when these six pages of conditions were reduced to an eye-defying "thicket of Lilliputian print" squeezed into a space on the ticket measuring 2¾ inches by six inches. (See reproduction of the actual ticket "Conditions of Contract" herein. A. 78a).

V.

Alitalia's Claim For a Jury Trial is Belated and was Waived. The Parties had Agreed to Treat the Question As a Matter of Law. In any Event the Ticket was Insufficient As a Matter of Law.

Alitalia for the first time at Point V of its brief now claims that the readability of the ticket should be decided by a jury. As was specifically noted in the majority opinion: "The parties have agreed that this is a question of law for the court to decide" (A. 98a). Alitalia's position in its briefs below (repeated in page 25 of its present brief) was that as a matter of law, the ticket need not contain any information; that it could deliver any paper amounting to a blank "Boarding Pass", that the limitations of the Convention "applies automatically" in a Warsaw transportation. The Court of Appeals below held the ticket defective as a matter of law:

> "We agree (with Judge MacMahon) that a jury could not reasonably have found that the tickets and baggage checks gave the passengers the required notice." (A. 76a).

To the same effect were the holdings in the *Egan, Martens* and *Warren* decisions.

VI.

In Any Event, Even if the Ticket and Baggage Check Were Noticeable and Readable, the Ticket Lacks an Unqualified Notice that the Transportation is Specifically Subject to the Warsaw Convention.

The DiSclafani Ticket Suffers From a Further Deficiency.

A.

It is respectfully submitted that the statement on the tickets was defective in that it was unnoticeable, unreadable, and even if it could be read, it did not clearly and unequivocally state that the journey was subject to the rules of limitation of liability of the Warsaw Convention, Article 3(1)(e). It would take a highly specialized international air transportation lawyer to determine from the ticket, even if it could be read, whether the Warsaw Convention applied, much less the average passenger.

As the court below said of the ticket:

> "Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon." (A. 98a).

Drion, an airline lawyer, felt obliged to state in his book:

> "Whether the transportation is international, the passenger—who anyhow should be an expert in the Warsaw Convention—can easily determine with his knowledge of the places of departure and destination and the agreed stopping places, assuming that he knows by heart the countries which have ratified the Con-

vention. *Preposterous as these assumptions are, they are not much more unrealistic than the idea that by telling a passenger in a printed clause that the rules of liability of the Convention will apply to his carriage, he would have any clear ideas about his legal rights.* With this requirement we are in the fairyland of legal thinking, where fairy passengers will thoroughly study all the fine print on their tickets before embarking on the plane. . . . It has been said that the IATA formula is an evasion of the Convention and that it is meaningless, because it merely states that the Convention applies when it applies . . ." (p. 105).

Westminster Bank Ltd. v. *Imperial Airways, Ltd.*, 2 All Eng. Law Reports 890 (1936), 1936 U.S. Av. Rep. 39, is directly in point. The defendant received three bars of gold worth £9,138 for transport London to Paris. The consignment note had the following on the back thereof:

"Carriage by Air: The general conditions of carriage of goods are applicable to both internal and international carriage. These general conditions are based upon the Convention of Warsaw of October 12, 1929, insofar as concerns international carriage within the special meaning of the Convention."

The Westminster Court held:

"In my opinion a statement that the carriage is subject to certain general conditions of carriage of goods which general conditions are based upon the convention is not a statement that the carriage is subject to the rules relating to liability established by the Convention. To say that certain conditions are applicable to the carriage, is, in my opinion a very differ-

ent matter from saying that the Convention governs the carriage" (p. 897).

The court allowed plaintiffs the full value of the gold bars even though no special declaration of value thereon had been made by the shipper (p. 897).

To the same effect is *Phillipson* v. *Imperial Airways*, (1939), Appeal Cases, 332,345, in which the court similarly found that the air consignment note failed to comply with the notice requirements of the Convention and allowed full recovery. The above English cases thus agree in principle with the American rule. In *Petition of The Dodge, Inc.*, 282 Fed. 2d 86, 89 (C.A.2, 1960) the court said:

> "However, we think that ambiguous language in statutory provisions relating to limit here of liability should be resolved in favor of interpretations increasing instances where full recoveries from the limiting vessel are possible."

See also *Rawson* v. *Pennsylvania R.R. Co.*, 48 N.Y., 212, and *General Precision* v. *Burnham Service*, 46 Misc. 2d 586.

B. *Imputed Knowledge Requires Notice In The Official Language of the Country Where The Ticket Is Issued. (Assuming The Question To Be Reached).*

As to the *DiSclafani* passengers (*Como*), it is respectfully submitted that in order to charge them with imputed notice of the conditions of the contract that conditions of contract must be in the official language of the country where the ticket was issued, which was indisputably Arabic in this case. Assuming, but not conceding that the Warsaw Convention limitation would be otherwise applicable to the DiSclafanis, the ticket contract as to them is defec-

tive since it is written in a language other than the official language of the country where the ticket contract was issued and made. (A. 162).

See *Nejat* v. *British Overseas Airways Corporation*, 9 Avi. 18,154, California Superior Court, San Francisco County, April 28, 1966, which held that: the liability limitation contained in an air transportation ticket which was printed in English and which was issued in Iran was contrary to public policy and unenforceable because not made in the language of the country in which issued. Inherent in the concept of "notice", whether the purpose of the notice is the attempted limitation of a carrier's liability or to comply with due process in service by publication, is the implied condition that the notice must be in "communicable form" to the public of the country involved. See *New York Central Railroad* v. *Fraloff*, 100 U.S. 24.

VII.

The Foreign Authorities and Cases Cited by Alitalia Are Not in Point. The *Amici* Briefs Supporting Alitalia are Cumulative.

Alitalia refers to books written by Goedhuis, Shawcross and Beaumont and Drion. It is questionable whether they would qualify as disinterested legal scholars. Alitalia cannot deny that they have variously served principals (whose interests as to Warsaw were in limiting liability), such as International Airlines, or their European Government owners, or their insurers.

Dr. Goedhuis' book was published in 1937 when international air transportation was in its infancy and court decisions were sparse. As its title suggests, Goedhuis was primarily concerned with comparing the air legislation of

various countries with t e Warsaw Convention in an effort to expand the Convention's acceptance. As stated in his preface, his book was an outgrowth of his report to the International Air Traffic Association, the purpose of which was to push the adoption of the Warsaw Convention by all countries. At page 14 of the Alitalia brief, an excerpt from Goedhuis is cited. However his comments clearly relate to the form rather than the substance of the ticket as he states later on in the same page 157:

> "The principles which must regulate the question of traffic documents in the Warsaw Convention are the following:
>
> 1) the carrier must make use of traffic documents in the form prescribed by the Warsaw Convention.
>
> 2) the carrier must bear the consequences of damage sustained by a passenger or consignor arising from an omission or irregularity on these documents, due to the fault of the carrier."

As Goedhuis states in a footnote to the paragraph excerpted by Alitalia: ". . . the question of whether the carrier will be liable for damage sustained by a passenger due to faulty wording will be solved by common law, . . . there is no doubt the carrier will have to repair the damages inflicted on the passenger." (p. 153).

H. Drion, at one time, was an attorney long associated with KLM Airlines. His book, published in 1954, could not have considered the *Mertens* and *Warren* decisions. The excerpt quoted by Alitalia from *Drion* at page 14 of its brief does not assist it. Apart from the fact that Drion like the other author cited was performing a special pleading, he cites two inapplicable decisions as authority for the excerpt quoted by Alitalia. *Grey* v. *American*

Airlines which was rejected as inapplicable by the Court below; and *Pauwels* v. *Sabena*, 1950 U.S. Av.R. 367. The *Pauwels* case decided in 1950 by a Belgian Court did not involve the points here at issue. *Pauwels* involved a claim that the limitation clauses did not bind the passengers heirs. The readability of the ticket was not raised. As we previously noted at page 45 hereof, Drion has himself admitted that the ticket with its "fine print" is a "fairy-land" of unintelligibility.

Shawcross and Beaumont's long association with British air carriers or their insurance carriers is well known. Unfortunately, the latest edition of this book does not contain any reference to or discussion of *Mertens, Warren* or the District Court decision in *Lisi*, the only other decisions which have any real relevance to the issues involved herein. Examination of the sections of the book cited by Alitalia reveals that apart from the flat statement made by the authors that there is a distinction between Articles 3 and 4, there is no reasoned discussion nor reference to pertinent authority.[7]

The *Grey* case cited at page 12 of Alitalia's Brief was distinguished by the Court below in this and in the *Mertens* case. *Grey* was solely concerned with whether the omission in the passenger ticket of certain "agreed stopping places" as provided in Article 3 (1) (c) was fatal to the carrier. This relatively minor omission obviously did not affect the international character of the transpor-

[7] But see Beaumont: *Anomalies in the Warsaw Convention*, 14 J. Air L. & Co. 30, 34 in which he says: "When, however, we read Article 3 in conjunction with Articles 4 (4) and 9, it seems reasonable to conclude that, in order to preserve his rights under Articles 20, 21 and 22, all the carrier need do is to deliver a ticket, perhaps including *printed rubrics* for the particulars set out in Article 3 (1), (a) to (e), but without the necessity to have had any of these completed, except perhaps (e) *which would obviously be printed in any case.*"

tation in its flight from New York to Mexico, with the intermediate domestic stops of Washington and Dallas. Nor did it have any causal connection to the issue of notice to the passenger of limited liability under Warsaw as here. The *Preston* case cited by Alitalia at page 13 was concerned only with omission of certain intermediate "agreed stopping places" en route from London to Kenya and suffers from the same inappositeness as *Grey* upon which it relies. The *Montague* case cited at page 33 was concerned with goods. An interesting point was made by the Court for liberally construing a traffic document, when it said:

> "The reason is because it may be beyond the wit of any clerk to know in some cases whether the carriage is international carriage or non-international carriage. If you look at the definition of international carriage in the Convention you will see that it is a most complex definition."

The issue of notice or readability was not present in the lower court *Eck* decision and the *Manufacturers Trust,* cited at p. 33, case was sent back for trial on the issue of notice. However to the extent, if any, that it may be pertinent, *Manufacturers Trust* has in effect been overruled by the recent N.Y. Court of Appeals decision in *Egan,* supra. The *Seth* case, decided by the First Circuit, is concerned solely with the adequacy of the baggage check, which is not in issue here. The *Seth* case involved baggage and goods and not passengers. The issue of readability was not there raised. Whatever its shortcomings, it is consistent with the general American rule recognizing the principle of limited liability or released value with respect to baggage and cargo but not with respect to

people. *Conklin* v. *Canadian Colonial Airways, Inc.*, 266 N.Y. 244.

The cases cited by Alitalia and by its *amici* Brief supporters on the rules for construction of a treaty do not assist it. The *Amiable Isabella* case cited in Alitalia Brief page 18 contains a quotation out of context. In that case which was decided in 1821 the United States claimed that a foreign vessel captured by an American privateer was not within the protection of a treaty with Spain because the vessel was not properly documented to show nationality. The captor claimed that the ship and cargo were in fact British although disguised as Spanish. (p. 66). The following significant language was omitted by Alitalia:

> "We are to find out intention of parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and stop where that stops, whatever may be the difficulties or imperfections it leaves behind." (p. 71).

Since the claimant in the *Amiable Isabella* could not show strict compliance with the treaty and with forms of proof of Spanish nationality as the treaty required, his claim of immunity thereunder was rejected and the claims of the American privateer to ship and cargo were upheld (p. 76). Similarly here the burden of proof is upon Alitalia to show full compliance with Warsaw treaty before it may invoke its privileges and immunities.

The *Maximov* case cited and quoted out of context by Alitalia at page 17 of its brief is similarly *inapropos*. There the issue was "whether an American Trust whose beneficiaries are British subjects and residents which returns capital gross income realized in this country is exempt from Federal Income Tax on gains by virtue of a

provision of the Income Tax Convention between United States of America and the United Kingdom." The Convention provided that a resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States Tax on gains from the sale or exchange of capital assets. The primary point involved was that the court in limiting the application of the treaty to a true British resident was concerned with the purpose of the treaty as well as the language and applied the rule that in claiming exemption or benefits therefrom the treaty would be strictly construed against such claimant. Similarly Alitalia claiming benefits or exemption from liability for its negligence under Warsaw by the rules of construction must have the treaty strictly construed against it.

The *Factor* case cited by Alitalia at page 17 involved an extradition treaty with England and the rule of construction stated there favors the plaintiffs herein, see *supra*, p. 21.

The *Valentine* case cited at page 17 of Alitalia's Brief involved an extradition treaty. In essence *Valentine* holds that the claimant of a right under treaty must show a specific grant of these privileges. The *Neilson* case cited at page 28 favors the plaintiffs. See reference thereto, *supra*, p. 21. The *Santovincenzo* case cited at page 17 of the Alitalia brief involved the application of a provision of a United States-Persia treaty under a favored nation clause of the United States-Italian treaty concerning the right of the Italian Consul to unclaimed property of a deceased Italian national in the State of New York. The court found no warrant for a "restricted interpretation" but looked to the treaty as a whole (p. 39).

The *Amici* briefs: The Briefs filed by the various *Amici* on behalf of Alitalia's position merely repeat the argu-

ments of Alitalia.[8] The reference to the Article by *Lowenfeld* and *Mendelsohn: The United States and the Warsaw Convention,* 80 Harv. L. Journal 497, as making a comment that Judge MacMahon's decision broke a chain of hundreds of precedents is extremely selective. The fact of the matter is that the Article did not cite a single case in support of this statement and apparently did not fully evaluate the *Lisi, Mertens* and *Warren* decisions. The Article deals mainly with the events leading to the denunciation of Warsaw by the United States and the later withdrawal of such denunciation. It should also be stated that there is no admission by the plaintiffs that the tickets contained the notice prescribed by the inapplicable Hague Protocol, as claimed at page 11 of the joint ATA-IATA Brief.

The briefs make reference to the Montreal agreement pursuant to which the airlines persuaded the United States to withdraw its denunciation of Warsaw by agreeing to file tariffs raising limits to $75,000 in terms of liability. However these tariffs are not treaties and may be withdrawn by any of the carriers upon due notice and furthermore the agreements apply only to trips touching upon the United States. (See opinion of court below, note 7.)

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[8] IATA's position is contradicted by its own Attorney Julian S. Gasdik, in his article on this type of ticket: *The New Contract between Air Carrier and Passengers,* 24 J. Air L. 86. 151, 153, (1957). Speaking of the so-called limitation of liability reference in the "Conditions of Contract" Mr. Gasdik acknowledged the mandatory require of notice to the passenger of the limitations of liability when he stated:

> "The first sentence is inserted in order to comply with para. 1 (e) of Article 3 of the Warsaw Convention requiring that the ticket shall contain a statement that the carriage is subject to the rules relating to liability established by the Convention. An earlier form of ticket was held not to comply with this requirement.". (Citing the *Westminster Bank* case, noted herein, *supra,* p. 45.

Conclusion

WHEREFORE, it is respectfully submitted that the judgments of the Court below be affirmed.

Respectfully submitted,

THEODORE E. WOLCOTT,
Counsel for Respondents.